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No. 99-1429

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IN THE

Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF KANSAS AND THE KANSAS CORPORATION COMMISSION AS RESPONDENTS IN SUPPORT OF THE PETITION

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BRIEF OF THE STATE OF KANSAS AND THE KANSAS CORPORATION COMMISSION AS RESPONDENTS IN SUPPORT OF THE PETITION

INTRODUCTION

The U.S. Court of Appeals for the D.C. Circuit's decision compelling the Federal Energy Regulatory Commission ("FERC") to order a full refund of Kansas *ad valorem* taxes collected since 1983, without recognizing the FERC's statutory authority to waive on equitable grounds the prejudgment interest on those refunds, impacts not only the individual producers in the State of Kansas, but the gas industry and the economy in the State of Kansas as a whole. The real effects coupled with

the legal issues presented in the petition require further review by this Court.

Through compounding, and through the FERC's nearly interminable delay, the prejudgment interest associated with the refunds of Kansas *ad valorem* taxes now overwhelms the actual principal amounts due. Thus, its impact on the individual producers in the State of Kansas is both real and severe. Because many producers operate on very thin margins, these additional costs have made it uneconomical to operate many wells. It is therefore likely that the additional prejudgment interest requirement will cause marginal wells to shut-in.

The Court of Appeals' decision precluding the FERC from granting a generic waiver of interest places an additional burden on an already weak natural gas industry in the State of Kansas. The natural gas industry has been and continues to be a vital part of the Kansas economy. The State of Kansas and The Kansas Corporation Commission, therefore, have a compelling interest in the proper resolution of this case.

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance to the field of administrative law: Whether a court of appeals may curtail a federal agency's statutory authority to exercise its broad discretion to fashion remedial relief under statutes administered by the agency.

In the proceedings below, the U.S. Court of Appeals for the D.C. Circuit arrogated the Federal Energy Regulatory Commission's ("FERC") statutory authority to exercise its broad remedial discretion, in light of the equities, to award only partially retroactive refund relief, and instead compelled the FERC to order a retroactive remedy encompassing prejudgment interest for gas producers'

conduct that was lawful under FERC precedent at the time the conduct occurred. The Court of Appeals is required to grant an agency deference where, as here, the statutory language provides that agency with broad remedial discretion. In this case, however, the Court of Appeals flatly refused to grant such deference.

The Court of Appeals improperly exercised the statutory authority delegated by Congress to the FERC under section 502(c) of the Natural Gas Policy Act ("NGPA"). 15 U.S.C. § 3412. The Court of Appeals' decision is significant because it has far-reaching and harmful implications: It places in doubt the legitimacy of many administrative proceedings in which agencies fashion equitable remedies, and it impairs the subsequent judicial review of those administrative decisions. The fact that the Court of Appeals precluded the FERC from exercising its statutory authority, coupled with the fact that the Court of Appeals' decision could potentially jeopardize numerous other administrative proceedings, render a review of this matter by the U.S. Supreme Court compelling.

REVIEW IS WARRANTED BECAUSE THE FERC HAS THE STATUTORY AUTHORITY AND THE RESPONSIBILITY TO RENDER INDEPENDENT DETERMINATIONS REGARDING REQUESTS FOR RELIEF

FERC Has Equitable Jurisdiction

Based solely on the Court of Appeals' decision in *Public Service Co.* v. *FERC*, 91 F.3d 1478 (D.C. Cir. 1996), the FERC held that it was precluded from granting an across-the-board waiver of prejudgment interest with respect to the Kansas *ad valorem* tax refunds. The Court of Appeals in its decision below affirmed that determination. However, both the Court of Appeals and the FERC erred in reaching that conclusion. The FERC not only has the statutory authority to render an inde-

pendent determination regarding producers' requests for a generic waiver of interest, but it has a statutory responsibility to consider the matter and to render an independent decision on the merits.

The FERC has equitable jurisdiction to consider and to grant the requested generic waiver of interest under its remedial authority pursuant to Section 502(c) of the NGPA. 15 U.S.C. § 3412. Section 502(c) requires the FERC to consider such requests on their merits. In its *Public Service* opinion, however, the Court of Appeals erroneously concluded that the FERC could not independently analyze the merits of the producers' request for relief from full retroactive application of the FERC's decision. In its decision below, the Court of Appeals further held that the FERC could not consider the full range of traditional equitable factors in determining whether or not to permit the waiver of prejudgment interest, including the evidence presented by the State of Kansas. *Anadarko Petroleum Corp.* v. *FERC*, 196 F.3d 1264 (D.C. Cir. 1999, *as amended*, 200 F.3d 867 (D.C. Cir. 2000). Instead, the Court of Appeals nullified FERC's statutory discretion and compelled FERC to abjure its own statutory authority.

The producers and Kansas offered substantial evidence to the FERC that specific measurable harm has been perpetrated by the repayment obligation and the prospect of a ruinous amount of prejudgment interest. Many producers operate on very thin margins. The additional costs have made it uneconomical to operate many wells. The Kansas Corporation Commission's data on natural gas production from 1996 to 1998 (which is gathered in the ordinary course of the Commission's administrative duties) shows that total natural gas production has declined from 725 to 621 Bcf. Further, the 1996-1998 data show

a clear downward trend. It is likely that the additional costs of the refund requirement will cause marginal wells to shut-in. It is certain that this additional burden is being placed on an already weakened industry. The Court of Appeals' improper decision denied to FERC the remedial discretion to consider this evidence which is plainly relevant to any assessment of the equity of awarding retroactive relief generally, and prejudgment interest specifically.

FERC Has Remedial Discretionary Authority

Moreover, the statutory language of the NGPA provides the FERC with remedial discretionary authority. The FERC has a responsibility to exercise that authority to determine the extent to which retroactive relief is warranted, and to define and apply the equitable considerations that affect the appropriateness of full retroactive relief. The Court of Appeals may not usurp or curtail that authority. Rather, the Court of Appeals must grant an agency deference where, as here, statutory language provides it with broad remedial discretion. Because the Court of Appeals refused to grant such deference in this case, review by this Court is warranted to ensure that the FERC and other agencies may carry out their delegated statutory responsibilities.

The D.C. Circuit's 1996 *Public Service* decision and its 1999 *Anadarko* decision effectively eliminate the discretion granted to the FERC by Congress in the NGPA. The Court of Appeals disregarded the statutory authority granted to the FERC and created its own criteria for determining when retroactive relief, including prejudgment interest, is warranted. The decision casts doubt on the continuing ability of administrative agencies, even those with statutorily conferred discretion, to exercise their discretionary remedial authority. The Court of Appeals'

decision also may distort future judicial review of the remedial judgments made in administrative proceedings. Review by this Court, therefore, is necessary to ensure the proper administration and application of the FERC's statutorily granted authority under the NGPA, and that of other administrative agencies with remedial discretion.

CONCLUSION

For the reasons set forth above, the State of Kansas and The Kansas Corporation Commission urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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